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51 **UNITED STATES DISTRICT COURT**
 52 **NORTHERN DISTRICT OF CALIFORNIA**

53 ANIBAL RODRIGUEZ, JULIEANNA
 54 MUNIZ, ELIZA CAMBAY, SAL
 55 CATALDO, EMIR GOENAGA, JULIAN
 56 SANTIAGO, HAROLD NYANJOM,
 57 KELLIE NYANJOM, and SUSAN LYNN
 58 HARVEY, individually and on behalf of all
 59 others similarly situated,

60 Plaintiffs,

61 vs.

62 GOOGLE LLC,

63 Defendant.

64 Case No.: 3:20-cv-04688

65 **DECLARATION OF MARK C. MAO IN**
 66 **SUPPORT OF PLAINTIFFS' MOTION**
 67 **FOR RELIEF FROM CASE**
 68 **MANAGEMENT SCHEDULE**

69 **(CIVIL LOCAL RULE 16-2)**

70 The Honorable Richard Seeborg
 71 Courtroom 3 – 17th Floor
 72 Date: December 9, 2021
 73 Time: 1:30 p.m.

DECLARATION OF MARK C. MAO

I, Mark C. Mao, declare as follows.

1. I am a partner with the law firm of Boies Schiller Flexner LLP, counsel for Plaintiffs in this matter. I am an attorney at law duly licensed to practice before all courts of the State of California. I have personal knowledge of the matters set forth herein and am competent to testify.

2. This case was first filed on July 14, 2020 and the Case Management Scheduling Order was entered on October 23, 2020. Dkts. 1 & 59. Plaintiffs served discovery in this case less than three months after the action was filed and days after Google filed its first motion to dismiss. Specifically, Plaintiffs served their first set of document requests on Google on October 15, 2020. To date, Plaintiffs have served six total sets of document requests on Google containing 184 RFPs. Similarly, Plaintiffs served their first set of interrogatories on Google on November 4, 2020 and in total have served five sets of interrogatories. Plaintiffs have also served two sets of requests for admission.

3. Despite Plaintiffs' efforts, Google has repeatedly thwarted and delayed Plaintiffs' efforts to obtain necessary discovery. To date, Google has only produced 13,707 documents, most of which were limited to Google Analytics. Of those documents, only 6,304 were produced from Google's ESI search of its three Google-selected custodians for Google Analytics for Firebase. That production pales in comparison to the 714,197 documents totaling more than 5.3 million pages produced by Google in the similarly complex *Brown v. Google* matter pending before Judge Koh and Magistrate Judge van Keulen, where there are 42 Google custodians. While the production in *Brown v. Google* is considerably further along than the instant case, the fact discovery deadline in the two cases are nearly identical. Worse yet, much of Google's overall production appears to be publicly-available documents and as well as duplicates. Google has also so far refused to produce documents responsive to many of Plaintiffs' document requests, which the parties are still negotiating.

4. The need to extend the discovery schedule in this case first emerged in late-summer 2021 during the pendency of Google’s motion to dismiss Plaintiffs’ Second Amended Complaint. At the time, Google refused to produce broad categories of documents that went beyond Google

1 Analytics, claiming that it required the pleadings to be closed before committing to such
 2 production. To accommodate the delay caused by this refusal, Plaintiffs asked for a six-month
 3 extension of the existing discovery and expert disclosure deadlines. Google agreed that the
 4 deadlines were not realistic and represented to Plaintiffs that it would agree to a short modification
 5 of the schedule until after a ruling on its second motion to dismiss. Google said it was amenable
 6 to extending the discovery deadline further, but wanted the ruling to appropriately tailor the length
 7 of an additional extension. The parties submitted a joint requested modification of the existing
 8 scheduling order that sought to push the fact discovery deadline sixty days to January 11, 2022
 9 and also reset the expert disclosure deadline to the same date—moving it from its prior December
 10 13, 2021 date. Dkt. 125. The joint requested modification also acknowledged that the “parties
 11 agree to negotiate in good faith whether and to what extent a second extension may be needed after
 12 the Court has issued an order on the pending motion to dismiss.” *Id.* The parties further agreed to
 13 “meet and confer regarding the other deadlines as needed” “[a]fter the Court has issued an order
 14 on the pending motion to dismiss.” *Id.* Judge Seeborg entered the order modifying the schedule on
 15 August 13, 2021. Dkt. 126.

16 5. The Court granted in part and denied in part Google’s motion to dismiss the Second
 17 Amended Complaint on August 18, 2021. Dkt. 129. In that Order, the Court rejected Google’s
 18 attempt to limit the case to Google Analytics and allowed Plaintiffs to proceed with discovery on
 19 AdMob and Cloud Messaging. *Id.* In response to that Order, Plaintiffs filed their Third Amended
 20 Complaint and Google sought to dismiss that complaint in a motion currently pending before the
 21 Court. Dkts. 138 & 139.

22 6. Given that the pleadings remain unsettled, Google has still not provided any answer
 23 to any complaint in this action and has not otherwise identified any of its alleged affirmative
 24 defenses. Google recently asked for a stipulation on the motion to dismiss certain claims in the
 25 Third Amended Complaint and took the position that Google may not even be ready to answer
 26 Plaintiffs’ allegations.

27 7. While the pleading issues continue to be addressed by the Court, Plaintiffs have
 28 continued to press forward with discovery but have been met with delay from Google.

1 8. As mentioned above, a primary issue on which the parties are currently at odds is
2 custodians. Google has only agreed to produce documents from five custodians of its own
3 choosing, including documents from a single custodian for AdMob and a single custodian for
4 Cloud Messaging—both of which are complex technologies at issue in the Third Amended
5 Complaint that are critical to Plaintiffs’ case. Plaintiffs have asked for five (5) AdMob custodians
6 to start, given that AdMob produces the most revenue. Plaintiffs have asked for three (3) Cloud
7 Messaging custodians—the same number as requested and granted by the Court for Google
8 Analytics. But despite several meet and confers, Google maintains that it will offer only a total of
9 five custodians for the entire case.

10 9. Plaintiffs previously raised the custodian issue before Magistrate Judge Tse, who
11 ordered the parties to proceed with the production of the initial three Google-selected custodians,
12 allow Plaintiffs to review those documents, and instructed the parties to “then meet and confer . . .
13 regarding any further custodians Plaintiffs believe are justified in this case.” Dkt. 106. Google has
14 not complied with that order, informing Plaintiffs that it has not yet completed a full custodial
15 production for those three custodians. Plaintiffs, on the other hand, have diligently complied with
16 that order, reviewing the few documents produced so far and timely requesting information for 19
17 potential custodians and requesting additional relevant search terms.

18 10. Plaintiffs’ request for specific additional custodians is based on Google’s existing
19 production. A subset of those documents are attached to this declaration.

20 11. A true and accurate copy of a document produced by Google starting with Bates
21 Number GOOG-RDGZ-00020740 and used in support of Plaintiffs’ request to have Google
22 employee Eric Miraglia added as a custodian is attached as **Exhibit A**.

23 12. A true and accurate copy of a document produced by Google starting with Bates
24 Number GOOG-RDGZ-00033244 and used in support of Plaintiffs’ request for additional
25 custodians is attached as **Exhibit B**.

26 13. A true and accurate copy of a document produced by Google starting with Bates
27 Number GOOG-RDGZ-00024690 and used in support of Plaintiffs’ request for additional
28 custodians is attached as **Exhibit C**.

1 14. A true and accurate copy of a document produced by Google starting with Bates
2 Number GOOG-RDGZ-00024698 and used in support of Plaintiffs' request for additional
3 custodians Chris Ruemmler and Nick Linklow is attached as **Exhibit D**.

4 15. A true and accurate copy of a document produced by Google starting with Bates
5 Number GOOG-RDGZ-00054795 and used in support of Plaintiffs' request for additional
6 custodians is attached as **Exhibit E**.

7 16. Despite Plaintiffs' identification of those documents and use of them to support
8 requests for more custodians, Google has declined to provide discovery from any of the requested
9 individuals citing "burden" as a reason.

10 17. Google has also stonewalled Plaintiffs' efforts to raise this issue with Magistrate
11 Judge Tse. Plaintiffs provided their custodian letter brief to Google on October 14, 2021. Despite
12 repeated promises to get Google's portion of that brief to Plaintiffs, Plaintiffs only received
13 Google's portion of the letter brief more than two weeks after requesting it and only hours before
14 filing this motion. Plaintiffs are currently waiting on Google's portions of three additional joint
15 discovery submissions, submissions that in some cases Plaintiffs have waited on for weeks.

16 18. There are various outstanding discovery issues that are outlined in the paragraphs
17 that follow. Plaintiffs have engaged in hundreds of hours of letter-exchanges and meet and confers
18 with Google on these and other discovery deficiencies, often waiting many weeks before receiving
19 any substantive response from Google (if any response is received at all).

20 19. **Search Term Issue:** Google has delayed Plaintiffs' request for additional search
21 terms to be run against agreed-upon custodians. Despite repeatedly raising the issue with Google
22 in detailed letters, Google appears to have unilaterally run only a portion of Plaintiffs' proposed
23 terms without providing any hit counts or evidence supporting Google's decision to reject others
24 on the grounds of "overbreadth." Plaintiffs provided Google with a joint submission for the Court
25 to consider more than a week ago. The parties, however, are continuing to meet and confer to
26 address these issues.

27 20. **Preservation Issue:** Google is also stonewalling Plaintiffs' efforts to present certain
28 ESI preservation issues to the Court. Plaintiffs sent Google a draft joint dispute letter on this topic

1 more than two weeks ago on October 14, 2021, and Google still has not provided its insert. This
2 is critical, as it appears that Google is not only withholding but also destroying relevant evidence.
3 Google has declined to preserve data in two relevant logs that it admits “contain the data sent to
4 and held by Google via GA for Firebase when users’ Web & App Activity WAA toggle is not set
5 to ‘on’” and that it routinely purges every 56 days. And despite that the case is about data illegally
6 collected and used, Google has only identified two single logs for the entire case. After months of
7 negotiations regarding ESI preservation, Google has steadfastly refused to identify which data
8 sources may be relevant to WAA-off collection and sources related to the use of data collected.
9 Google is not only refusing to allow inspection of the technology at issue, such as source code,
10 algorithms, schemas, and logs. It is refusing to preserve them. Google has also taken the position
11 in this case that it would only produce relevant logs after a class has been certified. This has
12 resulted in Plaintiffs lacking basic documents concerning Google’s creation of the WAA controls
13 at issue in this lawsuit, and more documents are needed to put together a timeline of the changes
14 Google has made to its Firebase-collected data over time. [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED] Plaintiffs know that from a document produced by
18 Google. A true and accurate copy of that document produced by Google starting with Bates
19 Number GOOG-RDGZ-00019095 is attached as **Exhibit F**.

20 21. **Claw-Back Issue:** Google has recently “clawed-back” documents harmful to it—
21 including a document that on its face contained no indicia of privilege and that was already
22 redacted for privilege prior to production. The document is purely technical in nature given its
23 status as a “Privacy Design Document” created by and for Google engineers. Google clawed back
24 this document after Plaintiffs identified that it undercut Google’s baseless argument that Plaintiffs
25 acted in bad faith in making allegations in its Third Amended Complaint. Plaintiffs intend to bring
26 this issue before the Court and have already sent Google their portion of a joint discovery brief on
27 the topic. Google has not yet responded with its portion of the joint submission but has offered a
28 compromise.

1 22. **Privilege Log Issue:** Google has not produced any privilege log, even with respect
2 to documents already produced. Plaintiffs have requested this log but have yet to receive it.

3 23. **Deposition Issue:** Google is now attempting to force Plaintiffs to take overlapping
4 fact and 30(b)(6) depositions only days after its promised end-of-October production containing
5 limited custodial documents relating to the individuals to be deposed—well before it has even
6 come close to making the bulk of its document production. Plaintiffs served their first 30(b)(6)
7 deposition in March 2021 and sought once to compel that deposition. Simultaneously, Google has
8 previously taken the position that Plaintiffs, who it is intent into forcing into immediate
9 depositions, will be unable to amend the 30(b)(6) notice once those depositions have begun.
10 Plaintiffs have drafted a motion on this topic, but are still attempting to work with Google to reach
11 a compromise on this issue.

12 24. **Source Code Issue:** Despite repeated requests, Google has not produced any source
13 code or algorithms, even source code related to Google Analytics that Google claimed it was
14 “examining” in summer 2021, and it has made no commitment to producing similar source code
15 relating to AdMob and Cloud Messaging. All technical source code, algorithms, schemas for data,
16 or logs for the data at issue have been withheld.

17 25. **RFP and Other Identification Issues:** In addition to the above issues, there are also
18 several RFP-specific discovery disputes, many of which relate to Google’s failure to identify any
19 data sources or logs for AdMob even though it does not dispute that AdMob is used for real-time-
20 bidding (“RTB”), which includes the mobile app URLs even when WAA/sWAA (“Supplemental
21 Web & App Activity”) is off. Google has also not produced any documents, code, algorithms, or
22 data schema relating to RTB, AdMob, or Cloud Messaging. This issue will almost certainly require
23 Court intervention.

24 26. Given these issues, despite Plaintiffs’ diligence, the current January 11, 2021 fact-
25 discovery deadline is unworkable and would result in prejudice to Plaintiffs. More time is required.
26 Despite repeated requests, most recently in an October 21, 2021 email sent to Google’s counsel,
27 Google has declined to offer any extension of the deadline (despite its prior commitment to
28

1 negotiate in good faith a more realistic extension of the deadlines). Obtaining that relief and an
2 extension of the current Case Scheduling Order is the purpose of this motion.

3

4 I declare under penalty of perjury under the laws of the United States of America that the
5 foregoing is true and correct. Executed this 29th day of October, 2021, at San Francisco, California.

6 /s/ Mark C. Mao

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